IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RYAN T. McNULTY, et al.	:	
v.	:	Civil Action No. DKC 2003-2520
BOARD OF EDUCATION OF CALVERT COUNTY, et al.	:	

MEMORANDUM OPINION

Presently pending and ready for resolution in case between a former public school student, his parents, and the Board of Education of Calvert County, and several individuals is the motion by Defendants to dismiss, pursuant to Fed.R.Civ.P.12(b)(6), for failure to state a claim. The issues have been fully briefed and the court now rules, no hearing being deemed necessary. Local Rule 105.6. For the reasons that follow, the court will grant the motion to dismiss.

I. Background

A. Factual Background

The following are facts alleged by Plaintiffs Ryan McNulty, Letty McNulty and John McNulty in their amended complaint.[1]

[1] Plaintiffs filed an amended complaint, after Defendants filed the motion to dismiss, without seeking leave of the court to do so. However, because Defendants have not objected and the complaints are the same in all significant respects, the court will consider the amended complaint for purposes of this decision.

Plaintiff Ryan McNulty (Ryan), now 20 years of age, was a secondary school student with a diagnosed disability, Attention Deficit Hyperactivity Disorder (ADHD). Plaintiffs Letty McNulty (Mrs. McNulty) and John McNulty (Mr. McNulty) are Ryan's parents. During his sixth grade year at Northern Middle School, a "Section 504 Plan" (Plan) was developed to provide Ryan with certain accommodations that would enable him to participate in the educational services and programs provided by the school.[2] The Plan remained in effect when Ryan entered Northern High School, located in Calvert County, Maryland, in the fall of 1998.

During the 1998-1999 school year (ninth grade) and the fall of 1999, Ryan was subjected to several disciplinary measures. As a result, in December 1999, Craig Hunter, vice principal of Northern High School, assigned Ryan to the Calvert County Alternative Education Program (CCAEP), a separate education program conducted outside the mainstream of classes and designed primarily as disciplinary punishment. On separate occasions, Hunter allegedly told Mr. and Mrs. McNulty that "Calvert County can do no more for your son." Paper 27, ¶¶ 35-36. Plaintiffs contend that the assignment of Ryan to the alternative education

[2] The "Section 504 Plan" was devised and implemented in order to ensure compliance with Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

program was improper because no meeting was ever held to discuss the matter, as required under the Plan. The CCAEP did not offer the same classes in which Ryan had been enrolled at Northern High School. Ryan completed the 1999-2000 school year (tenth grade) at Fork Union Military Academy, a private school, where he earned a place on the honor roll and was a starter on the lacrosse team.

In the fall of 2000, Ryan re-enrolled at Northern High School for the eleventh grade. Upon his return, Hunter allegedly "continued with his hostile and retaliatory actions" toward Ryan, which included prohibiting Ryan from parking on the school campus and reprimanding him for an act that also was committed by six other students. *Id.*, ¶ 52. During this period, Ryan received additional disciplinary referrals. In early 2001, Ryan was suspended for an incident in which someone threw a battery out of a school bus window; Ryan insisted that he was not the culprit and the boy found to have thrown the battery did not receive any disciplinary action. In May 2001, Ryan received another disciplinary referral and was suspended for 10 school days, which lasted through the remainder of the school year. At two meetings, during 2001, school administrators and officials voted that Ryan's alleged conduct

was not a manifestation of his disability. Plaintiffs disagreed with the decisions.

Plaintiffs were subsequently informed that Ryan would fail the eleventh grade, even though he had passed all of his classes, because he had missed more school days than permitted. As a result, Ryan would be required to repeat the eleventh grade. Hunter denied Plaintiffs' request for a waiver of this policy. The Calvert County Public Schools (CCPS) eventually agreed to reinstate Ryan's class credits and to promote him to the twelfth grade. Ryan graduated from Northern High School in June 2002.

B. Procedural Background

On August 29, 2003, Plaintiffs filed a complaint against Defendants Board of Education of Calvert County; J. Kenneth Horsmon, superintendent of Calvert County Public Schools; Kathryn Coleman, director of student services; Raymond D'Arienzo, supervisor of student services; George Miller, principal of Northern High School; Craig Hunter, vice principal of Northern High School; Karen Neal, former vice principal of Northern High School; and James Parent, principal of the Calvert Career Center.[3] Each Plaintiff alleged discrimination in

[3] As noted, *supra*, Plaintiffs subsequently filed an amended complaint on December 5, 2003, which the court will consider.

violation of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Ryan and Mrs. McNulty also allege that they suffered retaliation as a result of advocating for their legal rights. In addition, Ryan filed claims against Defendants, pursuant to 42 U.S.C. § 1983, for Fourteenth Amendment violations of the Due Process and Equal Protection Clauses. All individual Defendants, except Horsmon, were sued both in their official and personal capacities. As relief, Plaintiffs seek compensatory damages, punitive damages, and attorney's fees and other costs. On November 3, 2003, Defendants filed a motion to dismiss for failure to state a claim.[4]

II. Standard of Review

The purpose of a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) is to test the sufficiency of the plaintiff's complaint. *See Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999). Accordingly, a 12(b)(6) motion ought not be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46

[4] Defendants also have filed a motion for leave to file a reply brief in excess of the page limit. *See* Paper 30. The court will grant the motion.

(1957). Except in certain specified cases, a plaintiff's complaint need only satisfy the "simplified pleading standard" of Rule 8(a), *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002), which requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

In its determination, the court must consider all well-pled allegations in a complaint as true, *see Albright v. Oliver*, 510 U.S. 266, 268 (1994), and must construe all factual allegations in the light most favorable to the plaintiff. *See Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 783 (4th Cir. 1999) (citing *Mylan Laboratories, Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993)). The court must disregard the contrary allegations of the opposing party. *See A.S. Abell Co. v. Chell*, 412 F.2d 712, 715 (4th Cir. 1969). The court need not, however, accept unsupported legal allegations, *Revene v. Charles County Comm'rs*, 882 F.2d 870, 873 (4th Cir. 1989), legal conclusions couched as factual allegations, *Papasan v. Allain*, 478 U.S. 265, 286 (1986), or conclusory factual allegations devoid of any reference to actual events, *United Black Firefighters v. Hirst*, 604 F.2d 844, 847 (4th Cir. 1979).

III. Analysis

A. Title II of Americans with Disabilities Act

1. Official Capacity

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Plaintiffs allege that Defendants violated this provision of the ADA by failing to adhere to the Section 504 Plan for Ryan, disciplining him without due process, and retaliating against Ryan and Mrs. McNulty for exercising their legal rights. Defendants argue, *inter alia*, that the Board of Education and the individuals sued in their official capacities are protected from suit for monetary damages by sovereign immunity under the Eleventh Amendment. The court agrees.

A district court "ought to consider the issue of Eleventh Amendment immunity at any time. . . because of its jurisdictional nature." *Suarez Corp. Indus. v. McGraw*, 125 F.3d 222, 227 (4th Cir. 1997).[5] The Fourth Circuit previously held

[5] The Fourth Circuit has acknowledged that it is "unclear," based on its case law, whether discussion of Eleventh Amendment immunity in the motion to dismiss context invokes failure to state a claim under Rule 12(b)(6) or lack of subject matter jurisdiction under Rule 12(b)(1). *Andrews v. Daw*, 201 F.3d 521, (continued...)

that "Congress did not validly abrogate the sovereign immunity of the states when it enacted. . . Title II of the ADA," as to the entire statute, because it exceeded its authority under the Enforcement Clause (§ 5) of the Fourteenth Amendment in doing so. *Wessel v. Glendening*, 306 F.3d 203, 215 (4th Cir. 2002). However, the Supreme Court recently departed from its usual broad treatment of such statutes––which the Fourth Circuit employed in *Wessel*––and instead opted for an "as applied" approach in the Title II context. *See Tennessee v. Lane*, 124 S.Ct. 1978, 1992 (2004) ("nothing in our case law requires us to consider Title II, with its wide variety of applications, as an undifferentiated whole").

In *Lane*, the Court held that Congress' abrogation of Eleventh Amendment immunity in Title II of the ADA was valid "as it applies to" the enforcement of "the constitutional right of access to the courts." *Id.* at 1993. This right of judicial access is among the "basic constitutional guarantees, infringements of which are subject to more searching judicial review" and is "protected by the Due Process Clause of the Fourteenth Amendment." *Id.* at 1988. By contrast, with regard to the instant case, the Court "has not identified education as

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525 n.2 (4th Cir. 2000).

a fundamental right." *Sellers by Sellers v. School Bd. of City of Mannassas, Va.*, 141 F.3d 524, 530-31 (4th Cir.) (citing *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 33-37 (1973)), *cert. denied*, 522 U.S. 871 (1998). Furthermore, because disabled persons are not considered a suspect class, "state action affecting the disabled is subject only to rational basis review." *Wessel,* 306 F.3d at 210 (citing *City of Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432, 442-47 (1985)).

Although it presented the issue in *Lane* as "whether Title II exceeds Congress' power under § 5 of the Fourteenth Amendment," the Court purposefully did not decide whether the statutory abrogation of sovereign immunity was constitutional with regard to non-fundamental rights, such as education. *Lane*, 124 S.Ct. at 1982.[6] Indeed, the Court concluded that because it found the abrogation valid as applied to the right of access to

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[6] Interestingly, and perhaps somewhat contradictorily, the Court later stated:

> Whatever might be said about Title II's other applications, the question presented in this case is not whether Congress can validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths, but whether Congress had the power under § 5 to enforce the constitutional right of access to the courts.

Lane, 124 S.Ct. at 1992-93.

the courts, "we need go no further." *Id.* at 1993.[7] Therefore, this court finds that Eleventh Amendment immunity remains intact for education claims under Title II of the ADA. In this case, Defendants are shielded from suit for monetary damages if they can establish their status as state entities.

The Board of Education may establish that it is a state agency entitled to sovereign immunity if the judgment against the Board of Education either (1) would be paid from the State of Maryland's treasury, or (2) "would adversely affect the dignity of the State as a sovereign and as one of the United States." *Cash v. Granville County Bd. of Educ.*, 242 F.3d 219, 223-24 (4th Cir. 2001). To satisfy this latter inquiry, "the relationship between the governmental entity and the State must

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[7] Commentary in the aftermath of *Lane* suggests that the Court may have done more to heighten confusion than settle it. *See, e.g.,* Linda Greenhouse, *Justices Find States Can Be Liable for Not Making Courthouses Accessible to Disabled*, N.Y. Times, May 18, 2004, at A20 ("Clearly there is no margin to spare, and claims involving access to places where fundamental rights are not usually exercised--publicly owned hockey rinks were one example the majority mentioned in passing--may not fare as well"); Marcia Coyle, *More Litigation Seen Over Court Access: Scope of Title II Still Unclear after 'Lane,'* Nat'l L.J. 1, May 24, 2004, at Col. 1 (ruling in *Lane* "will trigger piecemeal litigation involving the disabled and higher education, social services and other public activities"); David R. Fine, *Tennessee v. Lane: Court Left Issues Open*, Nat'l L.J. 23, June 7, 2004, at Col. 3 (narrow holding of *Lane* offers "little guidance with regard to the thousands of other problems persons with disabilities might confront in their encounters with the government").

be sufficiently close to make the entity an arm of the State." *Id.* at 224.[8]

This court has made clear, consistently and repeatedly, that the county boards of education of Maryland are state agencies and therefore immune under the Eleventh Amendment from suit for monetary damages. *See, e.g., Lewis v. Bd. of Educ. of Talbot County,* 262 F.Supp.2d 608, 614 (D.Md. 2003); *Biggs v. Bd. of Educ. of Cecil County, Maryland*, 229 F.Supp.2d 437, 444 (D.Md. 2002); *Adams v. Calvert County Public Schools*, 201 F.Supp.2d 516, 521 (D.Md. 2002); *Rosenfeld v. Montgomery County Public Schools*, 41 F.Supp.2d 581, 586 (D.Md. 1999); *Jones v. Frederick County Bd. of Educ.*, 689 F.Supp. 535, 538 (D.Md. 1988). In fact, this court has held specifically that the Calvert County Board of Education, a Defendant in the instant case, enjoys the protections of sovereign immunity in suits for monetary damages. *See Adams*, 201 F.Supp.2d at 520 n.3, 521. Thus, the Board of Education, as a state agency, is "immune from suit for monetary damages under Title II of the ADA." *Biggs*, 229 F.Supp.2d at

[8] To determine whether such a relationship exists, the court considers: "(1) the degree of control that the State exercises over the entity or the degree of autonomy from the State that the entity enjoys; (2) the scope of the entity's concerns--whether local or statewide--with which the entity is involved; and (3) the manner in which State law treats the entity." *Cash*, 242 F.3d at 224.

444. In the instant case, Plaintiffs seek only monetary damages, as opposed to any permissible prospective, injunctive relief.

It is well established that a suit against a state official in his or her official capacity "is no different from a suit against the State itself." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). Individual Defendants sued in their official capacities, as employees of the Board of Education, are state officials and therefore entitled to the same Eleventh Amendment immunity. *See Rosenfeld*, 41 F.Supp.2d at 586; *Jones*, 689 F.Supp. at 538. Accordingly, the motion to dismiss the claims under Title II of the ADA will be granted as to the Board of Education and to the individual Defendants in their official capacities.

2. Personal Capacity

Title II of the ADA, which provides disabled individuals redress for discrimination, "applies to 'public entities,' which include states and their departments and agencies." *Rogers v. Dep't of Health and Envtl. Control*, 174 F.3d 431, 433 (4th Cir. 1999). The term "public entity," as defined by the statute, does not include individual persons. *See* 42 U.S.C. § 12131(1).[9]

[9] Title II of the ADA defines "public entity" as:

(continued...)

Therefore, Plaintiffs cannot bring or maintain a suit against the individual Defendants in their personal capacities under Title II of the ADA. *See Pathways Psychosocial v. Town of Leonardtown, MD*, 133 F.Supp.2d 772, 780 (D.Md. 2001).

Plaintiffs do not contest this point; rather, they argue that the individual Defendants are still liable in their personal capacities for alleged retaliation in violation of the ADA. The anti-retaliation of the ADA provides, in pertinent part, that "[n]o *person* shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter." 42 U.S.C. § 12203(a) (emphasis added). However, the Fourth Circuit has held explicitly, in the Title II context as here, that "the ADA does not permit an action against individual defendants for retaliation for conduct protected by the ADA." *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 472 (4th Cir. 1999).

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[9](...continued)

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4) of Title 49).

42 U.S.C. § 12131(1).

While Plaintiffs acknowledge this holding, they instead invite the court to follow *Shotz v. City of Plantation, Fla.*, 344 F.3d 1161 (11th Cir. 2003), in which the Eleventh Circuit reached the opposite conclusion: "[A]n individual may be sued privately in his or her personal capacity for violating § 12203 in the public services context." *Id.* at 1179-80. Plaintiffs further assert that the *Shotz* analysis "suggests that the Baird decision is ripe for reconsideration." Paper 29 at 30. The position staked by Plaintiffs ignores "the principle that a federal court of appeals's decision is only binding within its circuit." *Virginia Soc'y for Human Life, Inc. v. Fed. Election Comm'n*, 263 F.3d 379, 393 (4th Cir. 2001); *see also Rosmer v. Pfizer Inc.*, 263 F.3d 110, 118 (4th Cir. 2001) (Fourth Circuit has its "own duty to interpret the law"), *cert. denied*, 536 U.S. 979 (2002). Indeed, this court is "bound to apply circuit precedent until it is either overruled *en banc* or superseded by a decision of the Supreme Court." *Chisolm v. Transouth Fin. Corp.*, 95 F.3d 331, 337 n.7 (4th Cir. 1996) (citing *Busby v. Crown Supply, Inc.*, 896 F.2d 833, 840-41 (4th Cir. 1990)). It is undisputed that *Baird* remains good law in this circuit and thus serves as the definitive word on this issue––*i.e.,* preclusion of personal liability under Title II of the ADA. Accordingly, the

motion to dismiss the claims under Title II of the ADA will be granted as to the individual Defendants in their personal capacities.

B. Section 504 of Rehabilitation Act

The relevant part of Section 504 of the Rehabilitation Act reads:

> No otherwise qualified individual with a disability in the United States. . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance

29 U.S.C. § 794(a). Therefore, Section 504 of the Rehabilitation Act and Title II of the ADA are subjected to the same analysis "[b]ecause the language of the two statutes is substantially the same." *Baird*, 192 F.3d at 468 (quoting *Doe v. Univ. of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1264 n.9 (4th Cir. 1995)); *see also Rogers*, 174 F.3d at 433 ("in many ways," Rehabilitation Act is "precursor" to ADA). Title II of the ADA actually incorporates as its "remedies, procedures, and rights" those provided in Section 504 of the Rehabilitation Act. 42 U.S.C. § 12133.

1. Official Capacity

Based on the foregoing discussion, Title II of the ADA and Section 504 of the Rehabilitation Act receive "the same

sovereign immunity analysis." *Biggs*, 229 F.Supp.2d at 440 n.1. For the reasons articulated in Section III.A.1., *supra*, the Board of Education and the individual Defendants in their official capacities are entitled to Eleventh Amendment immunity from suit for monetary damages under the Rehabilitation Act. *See id.* (sovereign immunity analysis for Title II of ADA "applies with equal force" to Section 504 of Rehabilitation Act). Accordingly, the motion to dismiss the claims under Section 504 of the Rehabilitation Act will be granted as to the Board of Education and to the individual Defendants in their official capacities.

2. Personal Capacity

As with Title II of the ADA, Section 504 of the Rehabilitation Act "does not permit actions against persons in their individual capacities." *Baird*, 192 F.3d at 472 (citing *Hiler v. Brown,* 177 F.3d 542, 545-46 (6th Cir. 1999)). This conclusion is consistent with the "general principle" that, given the substantial similarities in their language, the two statutes "should be construed to impose the same requirements when possible." *Baird*, 192 F.3d at 468-69. Accordingly, the motion to dismiss the claims under Section 504 of the Rehabilitation Act will be granted as to the individual Defendants in their personal capacities.

C. Due Process and Equal Protection (42 U.S.C. § 1983)

Plaintiff Ryan McNulty claims that Defendants violated his Due Process and Equal Protection rights under the Fourteenth Amendment by depriving and "denying him his benefit to a free and appropriate education" through allegedly discriminatory and retaliatory conduct, due to his disability. Paper 27, ¶¶ 96-97. He brings these claims pursuant to 42 U.S.C. § 1983.

1. Official Capacity

As established previously, the Board of Education and the individual Defendants in their official capacities are agents of the state entitled to Eleventh Amendment immunity. The Supreme Court has held that neither an entity functioning as a state agency nor its employees acting in their official capacities are "a 'person' amenable to suit under § 1983." *Inyo County, Cal. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701, 708 (2003) (citing *Will v. Michigan Dep't of State Police,* 491 U.S. 58, 71 (1989)).[10] Furthermore, in

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[10] Section 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall

(continued...)

enacting § 1983, Congress "had no intention to disturb the States' Eleventh Amendment immunity." *Will*, 491 U.S. at 66. Thus, the Board of Education and the individual Defendants in their official capacities are immune from suit for monetary damages, the entirety of relief sought by Ryan here. *See Biggs v. Meadows*, 66 F.3d 56, 61 (4th Cir. 1995) (compensatory damages or punitive damages, as relief, "is unavailable in official capacity suits"); *Lowery v. Prince George's County, Md.*, 960 F.Supp. 952, 959 (D.Md. 1997). Nor does Ryan offer any arguments to the contrary. Accordingly, the motion to dismiss the claims under § 1983 will be granted as to the Board of Education and to the individual Defendants in their official capacities.

2. Personal Capacity

It is well settled that "[o]nly States and state officers acting in their official capacity are immune from suits for damages in federal court." *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598, 609 n.10 (2001). As a general matter, the Eleventh

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> be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

Amendment "does not bar suits for damages against state officers, so long as those officers are sued in their individual capacities." *Sales v. Grant*, 224 F.3d 293, 297 (4th Cir. 2000) (citing *Kentucky v. Graham,* 473 U.S. 159, 165-66 (1985)), *cert. denied*, 532 U.S. 1020 (2001). Thus, the individual Defendants sued in their personal capacities are not entitled to sovereign immunity and Ryan has brought suit properly against them for monetary damages. This point of law, however, does not end the inquiry.

The crux of Ryan's § 1983 claims is that Defendants violated his Due Process and Equal Protection rights by depriving and "denying him his benefit to a free and appropriate education" through allegedly discriminatory and retaliatory conduct, due to his disability. Paper 27, ¶¶ 96-97. That is, the claims of harm allegedly suffered by Ryan all revolve around this purported deprivation and denial of "a free and appropriate education" by Defendants. The Individuals with Disabilities Education Act (IDEA) mandates that "[a] free appropriate public education" be made "available to all children with disabilities residing in the State between the ages of 3 and 21." 20 U.S.C. § 1412(a)(1)(A). Plaintiffs did not file suit under IDEA, but their repeated references to Ryan's right of "a free and

appropriate education" necessarily warrant discussion of the statute.[11]

Because "the touchstone of IDEA is the actual provision of a free appropriate public education" (FAPE), monetary damages generally are not recoverable under the statute. *Sellers*, 141 F.3d at 527-28 ("awards of compensatory and punitive damages inconsistent with IDEA's structure"). The Supreme Court has held that IDEA contains "a remedial scheme sufficiently comprehensive to supplant § 1983," so that disabled children must pursue claims to a free appropriate public education solely through that statutory scheme. *Blessing v. Freestone*, 520 U.S. 329, 347 (1997) (citing *Smith v. Robinson,* 468 U.S. 992 (1984)).[12] IDEA permits claimants "to invoke 'carefully tailored' local administrative procedures followed by federal judicial review." *Blessing*, 520 U.S. at 347 (quoting *Smith*, 468 U.S. at 1009). The Court concluded that allowing claimants "to skip these procedures and go straight to court by way of § 1983"

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[11] For purposes of this discussion, there is no functional difference (aside from omission of the word "public") between "a free appropriate public education" (FAPE) under IDEA and "a free and appropriate education" claimed by Plaintiffs.

[12] At the time the Court decided *Smith v. Robinson*, the Education of the Handicapped Act (EHA), predecessor of IDEA, was the applicable statute.

would have undermined the very purpose of the statute. *Blessing*, 520 U.S. at 347.

Plaintiffs' assertion that Ryan "is making no such claim. . . of a fundamental right to FAPE" (Paper 29 at 37) is belied by the repeated allegations in the amended complaint that Ryan was deprived of and denied "his benefit to a free and appropriate education" (Paper 27, ¶¶ 96-97)––allegations which operate as the undeniable basis for his § 1983 claims. In Plaintiffs' own words, "Ryan T. McNulty claims Defendants violated his constitutional property right to education by not following procedures for the suspension and expulsion of students with disabilities." Paper 29 at 36. Such a denial of a free appropriate public education or a violation of related procedural safeguards, as alleged by Plaintiffs, amounts only to a violation of IDEA; indeed, Plaintiffs must plead "a higher standard of liability" to allege a constitutional claim sufficiently––and properly invoke § 1983––at this stage. *Sellers*, 141 F.3d at 530.[13]

In sum, Ryan may not base a § 1983 claim, as he has attempted to do, on "an IDEA violation, which is *statutory* in

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[13] In *Sellers*, as in the instant case, Plaintiff alleged that Defendants "denied him equal access to a 'free appropriate public education'" in violation of, *inter alia*, § 1983. *Sellers by Sellers v. School Bd. of City of Mannassas, Va.*, 960 F.Supp. 1006, 1007-08 (E.D.Va. 1997). The Fourth Circuit affirmed the decision of the district court.

nature." *Id.* (emphasis in original). *See also Smith ex rel. Duck v. Isle of Wight County School Bd.*, 284 F.Supp.2d 370, 378 (E.D.Va. 2003) (disabled child's § 1983 claims fail where he "attempted to couch a statutory violation of the IDEA as a constitutional violation of his equal protection and due process rights"). If Ryan wishes to pursue his claims for alleged deprivation and denial of a "free and appropriate education," he may do so only under IDEA. Accordingly, the motion to dismiss the claims under § 1983 will be granted as to the individual Defendants in their personal capacities.

IV. Conclusion

For the foregoing reasons, the court will grant the Defendants' motion to dismiss. A separate Order will follow.

/s/
DEBORAH K. CHASANOW
United States District Judge

July 8, 2004